

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Office of General Counsel, Region 4
1130 North Westcott Road, Schenectady, NY 12306-2014
P: (518) 357-2048 | F: (518) 357-2087
www.dec.ny.gov

CERTIFIED - RETURN RECEIPT REQUESTED
7017 1070 0001 0125 7681

April 1, 2019

Aaron O'Bryan
1316 Thousand Acre Rd
Duanesburg, NY 12053

Re: Order on Consent
R4-2018-1226-211

Dear Mr. O'Bryan:

Enclosed please find a copy of the fully executed Order on Consent referenced above.

This will also acknowledge receipt of \$550 the civil penalty pursuant to Paragraph I.

Sincerely,



Karen Lavery
Assistant Regional Attorney
Region 4

Enclosure

ec: K. Parker
C. VanMaaren
M. Clark
J. Rider



Department of
Environmental
Conservation

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of
Article 24 of New York State Environmental
Conservation Law

ORDER ON CONSENT

R4-2018-1226-211

-by-

Aaron O'Bryan
1316 Thousand Acre Rd
Duanesburg, NY 12053

Respondent

WHEREAS:

Jurisdiction

1. The Department has jurisdiction over the regulation of work in protected wetlands as shown on the Final Freshwater Wetlands Maps filed by county for the State of New York and described in Article 24 of the Environmental Conservation Law and the rules and regulations promulgated pursuant thereto.

Facts

2. Respondent, Aaron O'Bryan, owns a parcel of land located at 1316 Thousand Acre Rd, Duanesburg, New York 12053 ("site") which includes Freshwater Wetland ("FWW") G-103.

3. On February 27, 2018, Respondent was issued a Nuisance Beaver Permit (No. 4536) for a beaver problem located at 1316 Thousand Acre Rd, WMU: 4A, Watercourse G-103, which has an expiration date of December 31, 2018.

4. Respondent possesses a General Permit GP-0-16-004- Breaching/Removal of Beaver Dams no more than 2 years old, which was issued on February 27, 2018 and has an expiration date of December 31, 2018, concurrent with the Nuisance Beaver Permit.

5. On November 29, 2018 and December 3, 2018, Department staff inspected the site.

First Violation

6. Regulations at 6 NYCRR 663.4(19) prohibits constructing, expanding or substantially modifying drainage ditches, in a wetland except as part of an agricultural activity.

7. At the time of the inspections, Department staff observed that Respondent had drained FWW G-103 by creating a drainage ditch around the beaver dam, in violation of regulations at 6 NYCRR 663.4(19).

Second Violation

8. Regulations at 6 NYCRR 663.4(20) prohibits filling in a wetland, including filling for agricultural purposes.

9. At the time of the inspections, Department staff observed that Respondent had placed fill around the culvert and failed to remove the dam material from the wetland, in violation of regulations at 6NYCRR 663.4 (20).

Third Violation

10. Condition No. 2 of Respondent's General permit provides that "*Disturbances to the beaver dam shall be limited to the minimum necessary to lower the impoundment. Disturbances to other portions of the protected stream or wetland are prohibited.*"

11. By creating a drainage ditch in the wetland which was outside the scope of actions authorized by the Nuisance Beaver Permit and General Permit, Respondent violated General Permit Condition No. 2.

Fourth Violation

12. Condition No. 3 of Respondent's General Permit provides that "*Unless the accompanying Nuisance Beaver Permit authorizes use of machinery, all work must be undertaken using hand methods only.*"

13. Respondent violated General Permit Condition No. 3 by using machinery to remove the beaver dam, which was not authorized by the Nuisance Beaver Permit.

Fifth Violation

14. Condition No. 6 of Respondent's General Permit provides that "*All machine-excavated beaver dam material shall be disposed of at an upland site outside the wetland and be suitably stabilized so that it cannot re-enter any waterbody, waterway or wetland area.*"

15. Although not authorized to use machinery as noted above, machinery was in fact used to remove the beaver dam. Respondent violated General Permit Condition No. 6 by leaving the machine- excavated beaver dam material in the wetland and around the culvert rather than at an upland site outside the wetland.

Civil Penalty

16. ECL § 71-2303 (1) provides for up to \$11,000 in civil penalties for each violation of a regulation and the restoration of the affected freshwater wetland to its condition prior to the violation.

Waiver of Hearing

17. Respondent affirmatively waived his right to notice and hearing in the manner provided by law and has consented to the issuing and entering of this Order on Consent and agrees to be bound by the terms, provisions and conditions contained herein.

NOW, having considered this matter and being duly advised, it is **ORDERED** that:

I. Civil Penalty

In respect of the aforesaid violations, a civil penalty in the amount of TWO THOUSAND SEVEN HUNDRED FIFTY DOLLARS (\$2,750) of which FIVE HUNDRED FIFTY DOLLARS (\$550) shall be paid by money order, or check made payable to the order of "New York State Department of Environmental Conservation," with the enclosed invoice and the Case Number of this Order on Consent written in the memo section of the check. The check shall be sent to:

**The Department of Environmental Conservation
Division of Management and Budget Services
625 Broadway
10th Floor
Albany, NY 12233-4900**

In the alternative, payment of the civil penalty can be made by electronic payment at <http://www.dec.ny.gov/about/61016.html#On-Line>

The balance TWO THOUSAND TWO HUNDRED DOLLARS (\$2,200) shall be suspended so long as Respondent shall comply with the Schedule of Compliance.

The penalty assessed in the Order on Consent constitutes a debt owed to the State of New York. Failure to pay the assessed penalty, or any part thereof, in accordance with the schedule contained in the Order on Consent, may result in referral to the New York State Attorney General for collection of the entire amount owed (including the assessment of interest, and a charge to cover the cost of collecting the debt), or referral to the New York State Department of Taxation and Finance, which may offset by the penalty amount any tax refund or other monies that may be owed to you by the State of New York. Any suspended and/or stipulated penalty provided for in this Order on Consent will constitute a debt owed to the State of New York when and if such penalty becomes due.

Payment of the above penalties shall not in any way alter Respondent's obligation to complete performance under the terms of this Order.

In the event that Respondent fails to comply with the requirements of this Order the entire suspended portion of the penalty shall become due and payable upon written notice to Respondent without prejudicing the Department from seeking further appropriate penalties for violations of this Order by Respondent.

The signed and notarized Order on Consent shall be sent to:

**New York State Department of Environmental Conservation
Region 4 Main Office
1130 North Westcott Road
Schenectady, NY 12306-2014
ATTN: Karen S. Lavery, Esq.**

II. Communications

All communications or submissions required herein shall be made to: Department -- DEC Region 4, 1130 North Westcott Road, Schenectady, NY 12306, Attention- Chris VanMaaren, Fisheries Manager, chris.vanmaaren@dec.ny.gov. All communications shall include a reference to the Order on Consent Case Number R4-2018-1226-211.

III. Schedule of Compliance

Respondent shall comply with the Schedule of Compliance set forth in this Order on Consent which is incorporated and made part of the terms, provisions, and conditions of this Order on Consent.

IV. Access

Respondent shall allow duly authorized representatives of DEC access to the facility referred to in this Order without prior notice, at such times as may be desirable or necessary in order for DEC to inspect and determine the status of Respondent's compliance with this Order or the ECL.

V. Summary Abatement

This Order shall not be construed to prohibit the Commissioner or his duly authorized representative from exercising any summary abatement powers, either at common law or as granted pursuant to statute or regulation.

VI. Indemnification

Respondent shall indemnify and hold DEC, New York State, and their representatives and employees harmless for all claims, suits, damages, and costs of every name and description arising out of or resulting from the fulfillment or attempted fulfillment of the provisions hereof by Respondent, its directors, officers, employees, servants, agents, successors or assigns.

VII. Review of Submittals

1. All documents which Respondent must submit pursuant to this Order are subject to Department approval.

2. The Department shall review each of the submittals Respondent makes pursuant to this Order to determine whether it was prepared, and whether the work done to generate the data and other information in the submittal was done, in accordance with this Order and generally accepted technical and scientific principles. The Department shall notify Respondent in writing of its approval or disapproval of the submittal. All Department-

approved submittals shall be incorporated into and become an enforceable part of this Order; and Respondent shall implement them in accordance with their respective schedules and terms, as approved.

3. a. If the Department disapproves a submittal, it shall so notify Respondent in writing and shall specify the reasons for its disapproval. Within the time frame set forth in that written notification, Respondent shall make a revised submittal to the Department that addresses and resolves all of the Department's stated reasons for disapproving the first submittal.

b. After receipt of the revised submittal, the Department shall notify Respondent in writing of its approval or disapproval. If the revised submission is not approvable as submitted, the Department, at its option, may disapprove it or may approve it on condition that Respondent accepts such modifications as may be specified by Department to make it approvable. If Respondent does not accept such modifications, the revised submission will be disapproved. If the Department disapproves the revised submittal, Respondent shall be in violation of this Order. If the Department approves the revised submittal, it shall be incorporated into and become an enforceable part of this Order.

4. Respondent shall modify and/or amplify and expand a submittal upon the Department's direction to do so if the Department determines, as a result of reviewing data generated by an activity required under this Order or as a result of reviewing any other data or facts, that further work is necessary. The Department agrees that any modifications it specifies will be reasonable and consistent with customary engineering standards.

VIII. Binding Effect

The provisions of this Order shall inure to the benefit of and be binding upon the Department and Respondent and its successors (including successors in title) and assigns.

IX. Modifications and Extensions

No modifications or extensions of this Order shall be made or become effective except as may be specifically set forth in writing by the Department.

X. Entire Order

The provisions of this Order constitute the complete and entire Order issued to the Respondent concerning resolution of the violations identified herein.

XI. Effective Date

The effective date of this Order shall be the date it is signed by the Regional Director.

XII. Reservation of Rights

Except as specifically provided in this Order, nothing contained in this Order shall be construed as barring, diminishing, adjudicating or in any way affecting:

A. Any legal or equitable rights or claims, actions, proceedings, suits, causes of action or demands whatsoever that the State may have against Respondent for any other violations of the ECL, rules or regulations promulgated thereunder.

B. Any legal or equitable rights or claims, actions, proceedings, suits, causes of action or demands whatsoever that the State may have against anyone other than Respondent, its officers, directors, agents, servants, employees, successors and assigns;

C. Whatever right the Department has to bring any action or proceeding against Respondent and/or any of Respondent's directors, officers, employees, servants, agents, successors, and assigns with respect to claims for natural resource damages; and

XIII. Respondent's right to assert all available defenses to any claims, actions, proceedings, suits, causes of actions or demands made or commenced by the State or the Department provided, however, that Respondent waives all legal or equitable rights claims, actions, proceedings, appeals, suits, causes of action, defenses or demands whatsoever that it may have to a judicial review of the validity and binding effect of this Order and whether or not this Order has been entered into voluntarily by Respondent.

IX. This Order shall be in full settlement of all claims for civil and administrative penalties that have been or could be asserted by the Department against Respondent, their trustees, officers, employees, successors and assigns for the above-referenced violations.”

X. This Order on Consent is not a permit, or a modification of any permit, under any federal, State, or local laws or regulations. Unless otherwise allowed by statute or regulation, Respondent is responsible for achieving and maintaining complete compliance with all applicable federal, State, and local laws, regulations, and permits. Respondent's compliance with this Order on Consent shall be no defense to any action commenced pursuant to any laws, regulations, or permits, except as set forth herein.

XI. The Order on Consent will terminate when all requirements imposed by this Order on Consent are completed to the Department's satisfaction.

DATED: Rotterdam, New York
March 29, 2019

Basil Seggos
Commissioner
New York State Department of
Environmental Conservation

BY:

A handwritten signature in black ink, appearing to read "Keith Goertz", written over a horizontal line.

Keith Goertz
Regional Director
Region 4

CONSENT BY RESPONDENT

Respondent, Aaron O'Bryan, hereby consents to the issuing and entering of this Order on Consent and waives his right to notice and hearing herein and agrees to be bound by the provisions, terms and conditions contained herein.

BY: Aaron O'Bryan

DATE: 3-14-19

STATE OF NEW YORK)
 ss:
COUNTY OF Albany)

On the 14 day of March in the year 2019 before me, the undersigned, a Notary Public in and for the State, personally appeared Aaron O'Bryan, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual executed the instrument.

Cindy Dillman

Notary Public
Qualified in the County of:
My Commission Expires:

NOTARY PUBLIC
NEW YORK STATE
SCHENECTADY COUNTY
01DI6180933
CINDY DILLMAN
EXPIRES 01/14/22

Schedule of Compliance

1. Within 60 days of the effective date of this Order, Respondent shall return the excavated material to the ditch which was trenched around the beaver dam.
2. Within 30 days of the effective day of this Order, Respondent shall propose in writing and submit to the Department for approval, a site to receive the material that has been pulled out of the beaver dam.
3. Within 30 days of Department approval re: No. 2 above, Respondent must move the beaver dam spoils to the approved site.
4. Within 30 days of the effective day of this Order, Respondent shall submit plans to the Department to alter the culvert to eliminate any barrier to aquatic organisms. A site visit can be scheduled within this 30 day window by contacting Chris VanMaaren at chris.vanmaaren@dec.ny.gov to provide assistance in plan development.
5. Within 60 days of Department approval re: No 4 above, Respondent shall complete the approved culvert modification.
6. Respondent is prohibited to utilize any heavy equipment within wetland G-103 for purposes other than those outlined in this Order or subsequently Department approved plans dictated by this Order or by future permitted activities that specifically outline the allowance for such use.